Plasterers and Cement Masons, Local 502[1] ***and*** **PBM Concrete, Inc.** ***and*** **Laborers', Local 109, Laborers' International Union of North America, and North Central Illinois Laborers' District Council.**[2] Case 13–CD–566

May 28, 1999

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

The charge in this Section 10(k) proceeding was filed February 18, 1999, alleging that the Plasterers and Cement Masons, Local 502 (Cement Masons) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing PBM Concrete, Inc. (the Employer) to assign certain work to employees it represents rather than to employees represented by the Laborers', Local 109 and Laborers' International Union of North America (Laborers). The hearing was held on March 18, 1999, before Hearing Officer Richard S. Andrews.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, PBM Concrete, Inc., is a corporation engaged in the business of fabrication, installation, and delivery of precast concrete building and bridge components. During the past calendar year, the Employer has purchased and received goods and materials valued in excess of $50,000 at its facility located in Rochelle, Illinois, directly from points located outside the State of Illinois. The parties present at the hearing stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Cement Masons, Laborers', Local 109 and Laborers' International Union of North America are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is engaged in the engineering, design, fabrication, delivery, installation (through subcontract), and finishing of precast concrete building and bridge components. Precast concrete products are manufactured at the Employer's facility in Rochelle, Illinois. The products are then delivered to the customer's jobsite and are installed and finished at that location. The process of storing, shipping, and installing the product results in chips, spalls,[3] fractures, or other damage that must be repaired, and holes resulting from the removal of inserts in the pieces must be patched before the job is complete. The finishing process used by PBM employees involves mixing the concrete, matching the color, texture, and composition of the concrete, and patching the chips or holes so that the patches are not visible to the customer. Customers may reject products if the finishing work is not done properly.

The Employer employs about 165 employees who are represented by Laborers', Local 109. Six of these employees are assigned to field operations. The jurisdiction of Laborers', Local 109 is DeKalb County, Illinois, and the city limits of Rochelle, Illinois. In October 1998, the Employer entered into a National Specialty Field Operations Agreement (National Agreement) with the Laborers' International Union of North America in order to use its own employees to perform finishing work on its products installed at jobsites outside the jurisdiction of Laborers', Local 109. Under the National Agreement, the Employer voluntarily recognized the Laborers as the exclusive representative of its field patchers. The National Agreement permits up to four Laborers-represented field patchers employed by the Employer to work at a given jobsite outside of Local 109's jurisdiction. If more than four patchers are needed on a job, the agreement provides that they be hired out of the hiring hall of the Local Laborers' Union in that geographic area. The conditions of employment of the Employer's field patchers are set forth in a separate "Specialty Field Operations" agreement (Field Agreement) between the Employer and Laborers', Local 109. The National Agreement and the Field Agreement together permit the Employer to use its own specifically designated field patchers on any jobsite in the United States for purposes of "grinding, sandblasting, patching, cleaning, caulking" and other specified tasks on products manufactured by the Employer.

In the fall of 1998, the Employer obtained a subcontract to design, manufacture, install, and finish precast concrete stadium risers at the Schaumburg Baseball Park in Schaumburg, Illinois. The general contractor was Turner Construction Company, which had a contract with the Cement Masons. After the risers were installed at the Schaumburg site, Paul Heiman, the Employer's field operations manager, inspected the job to determine how much finishing work would be required. He estimated that two field patchers could complete the work in about 5 days. On February 9, 1999, Heiman dispatched two of the Employer's Laborers-represented employees to the Schaumburg jobsite to patch, grind, and finish the risers. Later that morning, Heiman received a telephone

[1] The name of the Respondent appears as amended at the hearing.

[2] At the hearing, the hearing officer granted the motions of Laborers', Local 109 and Laborers' International Union of North America to intervene in this proceeding. North Central Illinois Laborers' District Council did not appear at the hearing.

[3] Spalls are larger chips, up to about 7–8 inches in area and about 3–4 inches deep.

call from someone who identified himself as Patrick Rizzo, a business agent for the Cement Masons.[4] Rizzo asked Heiman whether he was aware that there were two employees working at the Schaumburg project who "were not supposed to be there." Heiman told Rizzo that the employees had a right to be there, because PBM had a National Agreement with the Laborers. Rizzo told Heiman that the work was Cement Finishers' work in Cook County, and that Rizzo would picket the job if Heiman did not "get [his] guys off the job." Heiman suggested to Rizzo that he call David Taylor, the business agent for Laborers', Local 109. Rizzo called back a few minutes later, and stated that he could not reach Taylor. Heiman asked if the employees could finish the day and Rizzo said no, the work was Cement Finishers' work, that there were cement masons in the hiring halls who could do this work and that if Heiman did not pull the PBM employees off the job Rizzo would picket the job. As a result of this conversation, Heiman removed the Laborers-represented PBM employees from the job.

Heiman then called Mark Morrow, the Employer's vice president of contract administration. Morrow called Rizzo and asked what PBM could do to resolve the situation. Rizzo said PBM could take its employees off the site and hire two of Rizzo's employees. When Morrow replied that he did not think he could do that, Rizzo stated that if the PBM employees returned to the job, the Cement Masons would picket the job. Morrow then unsuccessfully attempted to contact several officials of the Laborers. Later that day, Heiman faxed Rizzo a copy of the National Agreement with the Laborers.

The next morning, Heiman spoke again with Rizzo who stated that he had received the faxed copy of the National Agreement but that it did "not hold any water in Cook County." Rizzo proposed that PBM hire a cement mason from the hall for every employee PBM had on the job. Heiman stated that that should not be necessary because of the National Agreement with the Laborers. Rizzo again stated that if PBM kept both of its employees working at the site, he was going to picket the job.

The two PBM employees were instructed to return to the site that day, but they were stopped by Pete Woeste, a superintendent for Turner Construction. Woeste stated that he was not going to let the PBM patchers "shut his job down." Morrow contacted Mark Simonides of Turner Construction to enlist his assistance in resolving the situation because Turner is signatory with the Cement Masons. Simonides stated that Turner was unwilling to get involved in the dispute. PBM employees have not returned to the jobsite, and the work remains incomplete.

B. Work in Dispute

The parties present at the hearing stipulated that the work in dispute is the sandblasting, grinding, patching, and finishing of precast concrete products manufactured by the Employer and installed at the Schaumburg Baseball Park in Schaumburg, Illinois.

C. Contentions of the Parties[5]

The Cement Masons contends that no jurisdictional dispute exists and that the notice of hearing should be quashed because there are no competing claims for the work and no proscribed activity took place. The Cement Masons argues that this is merely a contract dispute between the Cement Masons and Turner Construction, the general contractor, which has a collective-bargaining agreement with the Cement Masons containing a union signatory subcontracting clause. The Cement Masons maintains that under *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995), it has not made a claim for the subcontractor's work. Rather, the Cement Masons is merely pursuing a claim against Turner Construction for breach of its union signatory subcontracting clause. The Cement Masons further contends that the "Employer has failed to establish the voice on the phone allegedly claiming the work was an agent of Local 502 with authority to do so." The Cement Masons also maintains that if an award of the disputed work is made, it must be limited only to the PBM site at the Schaumburg Baseball Park.[6]

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, that there is no agreed-on voluntary method to resolve the dispute, and that the conduct of the Cement Masons constitutes a claim for the disputed work, contrary to the contention of the Cement Masons. Relying on *Electrical Workers IBEW Local 363 (U.S. Information Systems)*, 326 NLRB 1382 (1998), the Employer points out that the Cement Masons made a claim for the work directly to the subcontractor assigning the work and used proscribed means to enforce that claim. The Cement Masons did not, as it contends, merely peacefully pursue a contractual grievance against a general contractor. The Employer further maintains that the work in dispute should be awarded to employees represented by the Laborers. The Employer relies on its collective-bargaining agreement with the Laborers, its assignment and preference that the Laborers continue to perform the disputed work, area practice, the skills and training of Laborers-represented employees, and the economy and efficiency of operations. The Employer also argues that a broad award covering Cook County, Illinois, is appropriate because of the likelihood of future demands by the Ce-

[4] The parties present at the hearing stipulated that Patrick Rizzo is a business agent for the Cement Masons.

[5] The Laborers did not file a brief.

[6] At the hearing, Cement Masons argued that the work in dispute should be awarded to employees it represents based on longstanding areawide practice in Cook County and the 4-year apprenticeship program undergone by Cement Masons-represented employees. The Cement Masons did not renew this argument in its brief and did not introduce any evidence concerning the merits of the dispute.

ment Masons for finishing work performed in Cook County.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there are competing claims to disputed work between rival groups of employees and that there is reasonable cause to believe that a party has used proscribed means to enforce its claim.

As discussed above, there is evidence that, on February 9, 1999, the Employer's field operations manager Paul Heiman received a telephone call from someone who identified himself as Patrick Rizzo, a business agent for the Cement Masons. Rizzo asked Heiman whether he was aware that there were two employees working at the Schaumburg project who "were not supposed to be there." Rizzo added that the finishing work was Cement Finishers' work in Cook County and that he would picket the job if the PBM employees did not leave the job. Rizzo stated that there were cement masons in the hiring halls who could do this work and told Heiman that if Heiman did not pull the PBM employees off the job Rizzo would picket the job. Later that day, Rizzo told Morrow that if the PBM employees returned to the job, the Cement Masons would picket the job. The next day Rizzo told Heiman that the National Agreement did "not hold any water in Cook County," and that if PBM kept both of its employees working at the site, Rizzo was going to picket the job.

The Cement Masons filed a motion to quash the notice of hearing, arguing that it has not made a claim for the work. It contends that instead it has only pursued a contractual grievance against Turner Construction for violating its subcontracting provision which allows Cement Masons to pursue a pay in lieu of work claim for its breach. Cement Masons maintains that its action against Turner does not constitute a competing claim for disputed work under the rationale of *Laborers (Capitol Drilling Supplies)*, supra. We find no merit in this contention.

In *Capitol Drilling*, the Board held that in the construction industry, a union's effort to enforce a lawful union signatory subcontracting clause against a general contractor through a grievance, arbitration, or court action does not constitute a claim to the subcontractor for the work. The Board, however, distinguished those cases in which a union does more than peacefully pursue a contractual grievance against a general contractor. The Board found that a true jurisdictional dispute arises when a union seeking enforcement of a contractual claim not only pursues its contractual remedies against the employer with which it has an agreement, but also makes a claim for the work directly to the subcontractor that has assigned the work. In such circumstances, the Board stated that it would find truly competing claims and the use of threat or coercion to enforce a claim by the representative of either group of employees would be sufficient to trigger an 8(b)(4)(D) allegation and consequent 10(k) proceeding. *Electrical Workers IBEW Local 363 (U.S. Information Systems)*, supra; *Capitol Drilling*, 318 NLRB at 811–812.[7]

Here, as in *U.S. Information Systems*, the Cement Masons did not confine its action to a peaceful pursuit of a contractual claim against Turner Construction. Instead, Rizzo approached the subcontractor, PBM Concrete, directly and stated that the disputed work was Cement Masons' work. Cement Masons thereby made a clear and direct claim to the subcontractor for the disputed work. Further, Cement Masons, through Rizzo, used a threat of picketing to attempt to enforce the claim. In these circumstances, as in *U.S. Information Systems*, we find that there are competing claims for the disputed work, and we agree with the hearing officer that the Cement Masons' motion to quash the notice of hearing on this basis should be denied.

The Cement Masons also argues that the Employer has "failed to establish the voice on the phone allegedly claiming the work was an agent of Local 502 with authority to do so." Heiman testified that the person on the other end of the telephone line identified himself as Patrick Rizzo, a business agent for the Cement Masons. Rizzo did not testify and there was no evidence that Rizzo did not make the statements attributed to him by Heiman and Morrow. The parties have stipulated that Patrick Rizzo is indeed a business agent for the Cement Masons. While the Cement Masons appears to be attempting to cast doubt on the testimony of Heiman and Morrow that a Cement Masons business agent claimed the work in dispute and threatened to picket in support thereof, the Board need only find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred in order to proceed to the determination of a 10(k) dispute. *Electrical Workers IBEW Local 363 (U.S. Information Systems)*, supra; *Laborers Local 320 (Northwest Metal Fab & Pipe),* 318 NLRB 917, 918 (1995). We find that the testimony of Heiman and Morrow is sufficient to establish reasonable cause to believe that Cement Masons made a claim for the disputed work directly to the subcontractor assigning the work and violated Section 8(b)(4)(D) of the Act by threatening to picket in support of its claim.

We also find that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. At the hearing, Cement Masons orally moved to quash the notice of hearing on the

[7] Chairman Truesdale notes that he dissented in *Capitol Drilling*. See 318 NLRB at 812–813. He agrees with his colleagues, however, that the circumstances of this case are distinguishable and that the holding from which he dissented in *Capitol Drilling* is not applicable here.

basis of an alleged voluntary dispute resolution method.[8] However, no evidence was presented of any dispute resolution mechanism to which all parties are bound. Although the Cement Masons refused to stipulate that there is no agreed-on method for the voluntary adjustment of the dispute, we find, in light of the absence of any evidence to the contrary, that no such method exists. Accordingly, we agree with the hearing officer that the motion to quash the notice of hearing on this alternative basis should be denied.

Accordingly, for all these reasons, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting),* 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction),* 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.[9]

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute.

The Employer presented evidence that it has a collective-bargaining agreement with the Laborers and has no collective-bargaining agreement with the Cement Masons. The Employer's National Agreement with the Laborers' International Union of North America specifically covers PBM employees working on jobsites with PBM products. Article I.C. of that agreement covers, inter alia, "grinding, sandblasting, patching, cleaning, caulking, [and] painting." Article I, section 1 of the Employer's Field Agreement with Laborers', Local 109 recognizes Laborers', Local 109 as the exclusive representative of its field laborer employees engaged in, inter alia, "patching, sandblasting and caulking" of PBM products installed at jobsites. We find that the work in dispute is covered by the Employer's collective-bargaining agreements with the Laborers.

The Cement Masons presented no evidence that the Employer, PBM Concrete, Inc., has a collective-bargaining agreement with the Cement Masons covering the disputed work. Although the Cement Masons argues that it has a collective-bargaining agreement with Turner Construction, the general contractor, that agreement is not applicable because the company that ultimately controls and makes the job assignment is deemed to be the employer for purposes of a 10(k) proceeding.[10] Here, the relevant employer is PBM Concrete, Inc.

Accordingly, we find that the factor of collective-bargaining agreements favors awarding the work in dispute to employees represented by the Laborers.

2. Employer preference and current assignment

The Employer assigned the disputed work to employees represented by the Laborers and prefers that the work in dispute continue to be performed by Laborers-represented employees. Accordingly, this factor favors awarding the work in dispute to the employees represented by the Laborers.

3. Employer past practice

Prior to October 1998, the Employer generally subcontracted its post-installation finishing work, and used its own Laborers-represented employees to redo work improperly done by employees of the subcontractors. Because of its dissatisfaction with the performance of the subcontractors, the Employer entered into the National Agreement in order to enable its own employees to perform finishing work at the jobsites. Since October 1998, the Employer has been assigning finishing work to its own employees represented by the Laborers, and in February 1999 the Employer assigned the disputed work at the Schaumburg Baseball Park to its own Laborers-represented employees. There is no evidence that employees represented by the Cement Masons have ever performed finishing work on the Employer's products. Accordingly, we find that this factor favors awarding the work in dispute to employees represented by the Laborers.

4. Area and industry practice

The Employer presented evidence that PBM's competitors in Cook County, Illinois, and in Wisconsin and Minnesota use their own employees for patching and grinding work on their own products in the field. However, there is no evidence concerning whether the employees of those competitors are represented by Cement Masons, Laborers, or neither. Accordingly, we find that this factor does not favor awarding the work in dispute to employees represented by either Union.

5. Relative skills

The Employer's employees represented by the Laborers undergo extensive formal and on-the-job training. The training in patching and fixing the Employer's products is specific to the Employer's product line. New employees have a minimum of 30 days and a maximum of 90 days in training in the Employer's Rochelle, Illinois facility to learn the basics of remedial work on PBM products. Then the employees have a minimum of 30 days and a maximum of 90 days in training in the field,

[8] The Cement Masons did not renew this argument in its brief.

[9] The Cement Masons presented no evidence concerning the merits of this dispute.

[10] *Operating Engineers Local 150 (Austin Co.*), 296 NLRB 938, 940 (1989).

after which they are evaluated to determine if their performance is at the expected level. At that point they work under the tutelage of senior patchers. The Employer's field patchers have between 1 and 20 years of experience. The Employer is satisfied that its own Laborers-represented employees have the skills to perform the disputed work. The Employer was not satisfied with the quality of the work performed by non-PBM employees of the subcontractors used by the Employer prior to October 1998. No evidence was presented concerning the skills of Cement Masons-represented employees. Accordingly, we find that this factor favors awarding the disputed work to employees represented by the Laborers.

6. Economy and efficiency of operations

The Employer argues that it is more economical and efficient for it to assign the finishing work to its own employees represented by the Laborers because the work is done properly the first time and does not have to be redone. Hiring employees represented by the Cement Masons would require increased supervision and training. Cement Masons presented no evidence concerning this factor. Accordingly, we find that this factor favors awarding the disputed work to the Employer's employees represented by the Laborers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers', Local 109 and Laborers' International Union of North America (Laborers) are entitled to perform the work in dispute. We reach this conclusion relying on collective-bargaining agreements, employer preference and current assignment, past practice, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Laborers, not to that union or its members.

Scope of the Award

The Employer contends that the determination should be broad enough to cover Cook County, Illinois, arguing that Rizzo's threats and statements evidence the likelihood of future demands for PBM finishing work performed in Cook County. For the Board to issue a broad areawide award, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area and that similar disputes are likely to recur. There must also be evidence which demonstrates that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Electrical Workers IBEW Local 211 (Sammons Communications),* 287 NLRB 930, 934 (1987).

The Employer has presented no evidence of any prior jurisdictional disputes between the parties or any proclivity of the Cement Masons to engage in unlawful conduct to obtain similar work. Nor has the Employer shown sufficient evidence that the dispute is likely to recur in the future. There is no indication in the record that the disputed work has been a continuous source of controversy and will continue to be so. *U.S. Information Systems*, supra. For these reasons, we find a broad award inappropriate in this case. Accordingly, this determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of PBM Concrete, Inc. represented by Laborers', Local 109 and Laborers' International Union of North America (Laborers) are entitled to perform the sandblasting, grinding, patching, and finishing of precast concrete products manufactured by the Employer and installed at the Schaumburg Baseball Park in Schaumburg, Illinois.

2. Plasterers and Cement Masons, Local 502 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force PBM Concrete, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Plasterers and Cement Masons, Local 502 shall notify the Regional Director for Region 13 in writing whether it will refrain from forcing PBM Concrete, Inc. by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.